90-924

FILED
DEC. 10
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JOSEPH F. SPANIOL, JR.
CLERK

NO.______

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1990

GUADALUPE RAMOS.

Petitioner

V

JAMES A. BAKER III
SECRETARY OF THE TREASURY

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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[redacted]

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of the Fifth Circuit fail to apply the criteria for burden of proof as required by the U S Supreme Court in Texas Department of Community Affairs versus Burdine 450 U S 248 (1981) in determining the prima facie case can be rebutted by articulating vague inoffensive sounding subjective criteria?

A. Did the courts err in determining the record did not show the articulated explanation to be pretextual and without credence as allowed by criteria established in Burdine, supra?

PARTIES

The parties to the proceedings are set forth as follows;

Guadalupe Ramos, employee of the Internal Revenue Service at Austin Texas.

Petitioner

James A Baker III Secretary of the Treasury who is the head of the federal agency involved.

Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINIONS BELOW

NO.______

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1990

GUADALUPE RAMOS, federal employee of the Treasury Department working with the Internal Revenue Service.

Petitioner

V

JAMES A. BAKER III, Secretary of the Treasury

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
For the Fifth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

Petitioner, Mr Ramos represents unto this Court that he has been aggrieved by the decision reported below as Guadalupe Ramos versus James A Baker III, Secretary of the Treasury, No 89-7020, (5th Cir 1990). That the decision sustained a judgment in favor of respondent by the United States District Court for the

Western District of Texas cited as <u>Guadalupe Ramos v James A Baker III, Secretary of the Treasury,</u>, No A-87-CA-455, (WD Tx 1990)

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered September 12, 1990.

There was no request for a hearing and no extension of time within which to file the petition for a writ of certiorari.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

STATUE INVOLVED

The following sections of Title VII are involved in this case. 42 U.S.C. §2000e- 2(a), and 42 U.S.C. §2000e-3(a), which provide in pertinent part:

> It shall be unlawful employment practice for an employer to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of --race,color religion, sex or national origin.

> It shall be unlawful employment practice for an employer to discriminate against any of its employees - - because he has opposed any practice made unlawful employment practice by this title [42 U.S.C. §§2000e-2000e-17] or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title [42 U.S.C. §§2000e - 2000e-17].

STATEMENT OF THE CASE

Mr Ramos brought civil action alleging that the Internal Revenue Service had discriminated against him because of his national origin (hispanic) and for filing prior EEO complaints. The district court held that an unlawful motive played neither some part in the employment decision nor was a significant factor in the case. The decisions retarding the two promotion actions were appealed to the Fifth Circuit. The prior decisions do not mention or cite any reference to retaliation by the employer. The Fifth Circuit affirmed.

Jurisdiction to the United States Court of Appeals for the FifthCircuit was under 28 U.S.C. §1291 and 28 U.S.C. § 1294.

ARGUMENT

The district court cited Walsdorf v Board of Commissioners for East Jefferson Levee District 857 F2d 1047, 1052 and note 1 (5th Cir 1988) for its holding that unlawful motive played neither 'some part in the employment decision' nor was a significant factor' in the case. The referenced footnote delineates the differences of opinion between the various circuit courts regarding the applicable standard of causation in determining Title VII liability.

It cannot be said that the evaluation of Ramos by three ranking panel members resulting in the same 'identical' scores on each ranking element was simply a coincidence or that the court had any proof that such identical scores were the result of a performance evaluation.

Mr Ramos was encumbering the position in question via a temporary promotion at the time he was nonselected in September 1982. The employer claimed that 'national office experience' was the deciding factor in selecting the anglo male for the position. Mr Ramos was the only Hispanic GS 12 in the organization and the only Hispanic GS 12 candidate for the position. The record reflects ample testimony (pp 76-84 and 109-111, trial transcript) substantiating the claim that the explanation given was pretextual and without credence.

The Fifth Circuit accepted the employer's vague, inoffensive sounding subjective criteria, i.e., 'broader range of experience' as a legitimate nondiscriminatory reason for the nonselection of Mr Ramos.

The prior decisions ignore the fact that there were no established business reasons for 'national office experience' or a 'broad range of experience' Neither decision evaluated the employer's response against the established criteria for a business necessity as explained in Watson v Fort Worth Bank and Trust 108 S Ct 2777 (1988)

CONCLUSION

The record reveals a complete lack of selection criteria, selection guidelines, records of evaluating candidates during the promotion interview and only the articulation of the vague unsubstantiated subjective criteria of 'selecting the best qualified'. Pretext may be established either directly by demonstrating that a discriminatory reason more likely motivated the employer or indirectly

PUBLISHER'S NOTE:

ORIGINAL PAGINATION IS NOT CONTINUOUS.

by showing that the employer's proffered explanation is unworthy of belief. Mr Ramos did so; however, the lower courts ignored the <u>Burdine</u> supra, ruling and issued erroneous decisions.

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CERTIFICATE OF SERVICE

I certify that three copies of the foregoing petition with appendix was mailed this date, via certified mail, return receipt requested to the following:

Ronald F Ederer
United States Attorney
Western District of Texas
727 E Durango Blvd Suite A 601
San Antonio Texas 78206

Solicitor General
Department of Justice
Washington DC 20530

dated: 10th day of December 1990.

SHELBY W HOLLIN

APPENDIX 'A'

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 89-7020
Summary Calendar

GUADALUPE RAMOS, Plaintiff-Appelllant

versus

JAMES A. BAKER, III,
Secretary of the Treasury,
Defendant-Appellee.

Appeal from the United States
District Court for the
Western District of Texas
(A-87-CA-455)
(September 12, 1990)

Before CLARK, Chief Judge, POLITZ and DAVIS, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant Guadalupe Ramos ("Ramos"), an Hispanic male, challenges the district court's ruling that Ramos's employer, the Internal Revenue Service ("IRS"), did not discriminate against him when it failed to promote him on two occasions. Ramos exhausted his administrative remedies and brought a civil action alleging that the IRS violated Title VII by discriminating against him on the basis of his national origin (Mexican). His complaint alleged five instances of discrimination. After a bench trial, the district court made findings of fact and conclusions of

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* Local Rule 47.5 provides "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expenses on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Plaintiff-Appellant Guadalupe Ramos ("Ramos"), an Hispanic male, challenges the district court's ruling that Ramos's employer, the Internal Revenue Service ("IRS"), did not discriminate against him when it failed to promote him on two occasions. Ramos exhausted his administrative remedies and brought a civil action alleging that the IRS violated Title VII by discriminating against him on the basis of his national origin (Mexican). His complaint alleged five instances of discrimination. After a bench trial, the district court made findings of fact and conclusions of

---

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

law in which he ruled that the IRS had not violated Title VII. Ramos only appeals the district court's ruling with respect to two promotion decisions. He disputes the factual conclusion that the IRS articulated legitimate nondiscriminatory reasons for its promotion decisions and argues that the IRS's use of subjective criteria shows that the district court's conclusion was erroneous. He also argues that proof that an employer used subjective promotion criteria is sufficient to establish that the employer's articulated reasons are pretexts for unlawful discrimination. We reject both arguments and affirm.

In **Watson v. Fort Worth Bank & Trust,** ___ U.S. ___, 108 S.Ct. 2777, the Supreme Court held that the disparate impact analysis may be appropriate for Title VII challenges to subjective or discretionary

employment practices. See id., 108 S.CT. at 2786-87. In a disparate impact case, plaintiff alleges that facially neutral employment practices have an adverse impact on a protected group. "The evidence in these...cases usually focuses on statistical disparities, rather than on specific incidents..." Id., 108 S.Ct. at 2784-85. Ramos has not argued that the IRS's promotion practices adversely affect protected groups, and he has offered no evidence of statistical disparities. He only claims that the IRS discriminated against him by failing to promote him on two occasions. His claim therefore is one of disparate treatment.

The Supreme Court established a shifting burden structure for analyzing disparate treatment claims under Title VII when dismissal short of trial was

contemplated. First, the plaintiff must establish a prima facie case of discrimination. The defendant then has the burden to articulate legitimate nondiscriminatory reasons for its decision. Finally, the plaintiff then has the burden to show that the employer's articulated reasons are merely a pretext for unlawful discrimination. **See Texas Dep't of Community Affairs v. Burdine,** 450 U.S. 248, 252-56, 101 S.Ct, 1089, 1093-95 (1981); **McDonnell Douglas Corp. v. Green,** 411 U.S. 792, 800-805, 93 S. Ct. 1817, 1823-26 (1973).

Even though there was a fully tried case, the district court applied all steps in the disparate treatment analysis. In such a case, the court may move directly to the factual conclusion as to whether discrimination is established by the contemplated. First, the plaintiff must establish a prima facie case of discrimination. The defendant then has the burden to articulate legitimate nondiscriminatory reasons for its decision. Finally, the plaintiff then has the burden to show that the employer's articulated reasons are merely a pretext for unlawful discrimination. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-56, 101 S.Ct. 1089, 1093-95 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-805, 93 S. Ct. 1817, 1824-26 (1973).

Even though there was a fully tried case, the district court applied all three of the disparate treatment analysis. In such a case, the court may move directly to the factual conclusion, which whether discrimination is established by the whole of the proof. **See United States Postal Serv. v. Aikens,** 460 U.S. 711, 713-16, 103 S.Ct. 1478, 1481-82 (1983). He found: (1) that Ramos established a prima facie claim of discrimination, (2) that the IRS articulated legitimate nondiscriminatory reasons for its decisions, and (3) that Ramos failed to show that the IRS's articulated reasons were mere pretexts for discrimination. We will not disturb the district court's fact findings unless they are clearly erroneous. **See Barnes v. Yellow Freight Sys.,** 830 F.2d 61, 62 (5th Cir. 1987).

Ramos's first claim of discrimination stems from the 1981 decision of the IRS not to promote him to GS 13 and to promote a white male instead. The district court found that the IRS did not place Ramos on the "Best Qualified List" for the whole of the proof. See United States Postal Serv. v. Aikens, 460 U.S. 711, 715-16, 103 S.Ct. 1478, 1481-82 (1983). He found: (1) that Ramos established a prima facie claim of discrimination, (2) that the IRS articulated legitimate nondiscriminatory reasons for its decisions, and (3) that Ramos failed to show that the IRS's articulated reasons were mere pretexts for discrimination. We will not disturb the district court's fact findings unless they are clearly erroneous. See Barnes v. Yellow Freight Sys., 878 F.2d [illegible] (5th Cir. 1989).

Ramos's first claim of discrimination arose from the 1981 decision of the IRS not to promote him to GS-13 and to promote a white male instead. The district court found that the IRS did not place Ramos on the "Best Qualified List" for the promotion because his numerical performance evaluation was too low. Ramos's supervisor prepared the promotion appriasal based on his personal observations and information from Ramos's previous manager. The district court further found that the appraisal accurately evaluated Ramos's performance, that it contained no evidence of discrimination, and that Ramos failed to show that the IRS's performance evaluation was a pretext for discrimination.

Ramos also claims that the IRS discriminated against him by not promoting him to GS 13 in 1982. Ramos made the "Best Qualified List" in 1982, and he interviewed for the position. The district court found that the IRS selected a white male who had a broader range of experience for the position. In fact,

the record shows that the person who received the position already held a GS 13 position in Washington, D.C.. The district court concluded that the IRS again offered a legitimate nondiscriminatory reason and that Ramos failed to show that it was a pretext for discrimination.

The district court's findings were not clearly erroneous. Ramos argues, however, that the IRS used subjective criteria in making its promotion decisions. He contends an employer cannot articulate nondiscriminatory reasons for an employment decision when the employer considers subjective facts because an employee cannot effectively rebut subjective evaluations. We disagree.

The Supreme Court has recognized that

the record shows that the person who received the position already held a GS 11 position in Washington, D.C.. The district court concluded that the IRS again offered a legitimate nondiscriminatory reason and that Ramos failed to show that it was a pretext for discrimination.

The district court's findings were not clearly erroneous. Ramos argues, however, that the IRS used subjective criteria in making its promotion decisions. He contends an employer cannot articulate nondiscriminatory reasons for an employment decision when the employer considers subjective facts because an employee cannot effectively rebut subjective evaluations. We disagree.

The Supreme Court has recognized that

subjective evaluations of employees are necessary in many situations. See Watson, 108 S.Ct. at 2787 (noting that many important qualities such as job performance often cannot be objectively measured, and thatperformance evaluations often differ). This cicuit has repeatedly held that the use of subjective criteria does not constitute discrimination per se. E.g., Lewis v. National Labor Relations Bd., 750 F.2d 1266, 1276 (5th Cir 1985). Although we have recognized that the use of subjective criteria may serve to mask latent discrimination, see **Crawford v. Western Elec. Co.**, 614 F.2d 1300, 1315-17 (explaining that use of wholly subjective evaluations to determine whether an individual is qualified for a position is inherently suspect), we refuse to hold that an employer may not offer subjective evaluations in order to rebut a

plaintiff's prima facie case. Such a rule would make it impossible for many employers to defend Title VII suits because many jobs necessarily involve subjective qualities. Subjective evaluations may be especially important when, as here, an employer must select an employee from a group of qualified applicants.

We also disagree with the argument that Title VII plaintiffs cannot rebut an employer's subjective evaluations. Plaintiffs may be able to offer witness testimony and proof of job experience and other qualifications. They can also directly compare their qualifications with those of the other applicants. For example, in **Lee v. Conecuh County Bd. of Educ.**, 634 F.2d 959 (5th Cir. 1981), a case cited by Ramos, the employee offered objective plaintiff's prima facie case. Such a rule would make it impossible for many employers to defend Title VII cases because many jobs necessarily involve subjective qualities. Subjective evaluations may be especially appropriate where, as here, an employer must select an employee from a pool of qualified applicants.

We also disagree with the statement that Title VII plaintiffs cannot attack an employer's subjective evaluations. Plaintiffs may be able to offer evidence, testimony and proof of the employee's own other qualifications. They can also directly compare their qualifications with those of the other applicants. For example, in Lee v. Conecuh County Bd. of Educ., 634 F.2d 959 (5th Cir. 1981), a case argued by Hardy, the employee offered objective evidence of his superior qualifications and was able to successfully rebut the employer's subjective evaluations. **See id.** at 963. Moreover, plaintiffs can establish Title VII violations without proving discriminatory intent by attacking the subjective evaluation policy under the disparate impact theory. **See Watson,** 108 S.Ct. at 2786-87.

The IRS articulated legitimate nondisriminatory reasons for its decisions--job performance and experience. Ramos offered no evidence of intentional discrimination. The fact that Ramos could not prove his case does not mean that other Title VII plaintiffs will not be able to prove theirs.

Ramos also argues that, standing alone, his proof that the IRS used evidence of his superior qualifications and was able to successfully rebut the employer's subjective evaluations. See id. at 993. Moreover, plaintiffs can establish Title VII violations without proving discriminatory intent by attacking the subjective evaluation policy under the disparate impact theory. See Watson, 108 S.Ct. at 2786-91.

The EEOC articulated legitimate nondiscriminatory reasons for its decisions -- job performance and experience. Hamma offered no evidence of intentional discrimination. The fact that Hamma could not prove his case does not mean that other Title VII plaintiffs will not be able to prove theirs.

Hamma also argues that, standing alone, his proof made the required subjective factors demonstrates that the IRS's articulated reasons are pretexts for unlawful discrimination. We disagree. The fact that an employer uses subjective criteria does not mean that the employer unlawfully discriminates. A Title VII plaintiff must still prove discriminatory intent under the disparate treatment theory, or an adverse impact on a protected group under the disparate impact theory. Ramos has proven neither.

The judgment appealed from is

AFFIRMED

APPENDIX 'B'

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

GUADALUPE RAMOS, §
Plaintiff, §
§
v. § Civil No.
§ A-87-CA-455
JAMES A. BAKER, III, §
SECRETARY OF THE §
TREASURY, §
Defendant. §

JUDGMENT

In accordance with the Finding of Facts and Conclusions of Law entered in the above-styled and numbered cause on this case, the Court enters its judgment as follows:

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff, Guadalupe Ramos, take nothing in his suit against Defendant, James A. Baker, III, Secretary of the Treasury. Costs of Court are taxed against Plaintiff, for which let execution issue if not timely paid.

SIGNED this 31st day of August, 1989.

WALTER S. SMITH, JR.
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

GUADALUPE RAMOS, §
Plaintiff, §
§
v. § Civil No.
§ A-87-CA-455
JAMES A. BAKER, §
SECRETARY OF THE §
TREASURY, §
Defendant. §

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On the 22th day of August, 1989, this case came on for trial before the Court. In accordance with the testimony and evidence presented and upon consideration of argument of counsel, the following findings of fact and conclusions of law are hereby entered.

Finding of Fact

1) Plaintiff, Guadalupe Ramos is a Hispanic male, who began his employment

with the Internal Revenue Service in 1974. He transferred to Austin, Texas in 1976.

2) Plaintiff filed this action on August 13, 1987, alleging five instances of discrimination based on race, and retaliation for participation in the EEO process.

3) Plaintiff's complaints are as follows:

a) That in October of 1981, he was not selected to a level 13 position. (Complaint One).

b) That in 1982, he was retaliated against because of EEO activities when he was not allowed to be an acting manager and to attend a manager's meeting (during the absence of another employee). Also, that he had been evaluated excessively by his supervisor. (Complaint Two).

c) That he was not selected to a level 13 position in September of 1982. (Complaint Three).

d) That he was retailiated against because of EEO

activities when he was not allowed to attend an excise tax school in 1983. (Complaint Four)

e) That he was retaliated against because of EEO activities when he was not allowed to attend an estate and gift tax school in 1983. (Complaint Five).

4) Plaintiff was not placed on the "Best Qualified List" for the promotion action in Complaint 1 because his numerical evaluation was too low.

5) Plaintiff's supervisor, Osman Ahmed, prepared the promotion appraisal for the promotion action in Complaint One based upon his personal observations and information from Plaintiff's previous manager. The appraisal accurately evaluated Plaintiff's performance. There is no evidence of any racial discrimination in this instance.

6) As to Complaint Two, Plaintiff's supervisor at that time was Mr. Jack

Monasmith. Mr. Monasmith conducted five reviews of Mr. Ramos' work during a four month period. This was not an unusual or excessive level of review. The reviews indicated continued performance improvement and included complimentary language. There was no need or occasion during that period to utilize Plaintiff as an acting manager. There is no evidence of any retaliation surrounding this complaint.

7) Plaintiff made the "Best Qualified List" for the promotion action referenced in Complaint Three and was interviewed for the position. However, another individual was selected for the position. The selected individual had a broader range of experience for the position than did Plaintiff. There is no evidence of racial discrimination in this instance.

8) Regarding Complaint Four, Plaintiff was not selected for Excise Tax School in January 1983, was denied an opportunity to attend a manager's meeting, February 7 thorugh 11, 1983, and was denied an opportunity to be acting manager February 7 through 21, 1983. Plaintiff was not sent to Excise Tax School because there was little need for that training In Plaintiff's work and because Plaintiff was to be sent to Windfall Profits Tax School, a more important course. Plaintiff was not included in the manager's meeting because there was no useful role for him there. Plaintiff's supervisor maintained a practice of rotating acting manager assignments among his employees. During the period from September 20, 1982, through March 4, 1983, Plaintiff was acting manager for more days than any other employee in his unit. There is no

evidence that Plaintiff was retaliated against concerning this complaint.

9) As to Complaint Five, Plaintiff alleges retaliation for prior EEO activity when he was denied estate and gift taxation training in June, 1983. This training was not appropriate to Plaintiff's position and was not given to other similarly situated employees. The type of work for which the training was appropriate was performed by Estate and Gift Tax Attorneys, not by Revenue Agents.

10) Plaintiff has presented a prima facie case as to each complaint.

11) Defendant has articulated legitimate non-discriminatory reasons for each of its actions regarding the Plaintiff and such reasonable basis was not a pretext to mask discrimination. Neither the national origin of Ramos nor retaliation for EEO activity were factors

evidence that Plaintiff was retaliated against concerning this complaint.

VI As to Count Five, Plaintiff alleges retaliation for prior EEO activity when he was denied estate and gift taxation training in June, 1993. This training was not applicable to plaintiff's position and was not given to other similarly situated employees. The type of work for which the training was [illegible] was performed by Estate and Gift Tax attorneys, not by Revenue Agents.

(2) Plaintiff has presented a prima facie case as to each complaint.

(i) Each time the [illegible] experienced some discriminatory [illegible] [illegible] of the [illegible] [illegible] the Plaintiff was [illegible] [illegible] [illegible] a [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] in the actions or inactions regarding Plaintiff.

12) Any finding of fact which should more appropriately be a conclusion of law is deemed so.

Conclusions of Law

1) The issues before the Court in this proceeding are whether Plaintiff was discriminated against on the basis of national origin or retaliation for EEO activity when he was not promoted to theposition of Revenue Agent manager on October 18, 1981 and/or when not promoted On September 24, 1982, and/or by other acts of discrimination.

2) Jurisdiction to decide these issues exists by virtue of Title VII of the Civil Rights Act of 1964, as amended [42 U.S.C. §2000e-16(c)].

3) Plaintiff has raised claims of

disparate treatment on account of his national origin. Under *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) and *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973),

> ...[T]he plaintiff [first] has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate non-discriminatory reason for the employee's rejection." [*McDonnell, supra*], at 802, 93 S.Ct. at 1824. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderence of the evidence the that legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. *Id*. at 804, 93 S.Ct. at 1825.

Burdine, *supra* at 252, 101 S.Ct. at 1093.

disparate treatment on account of his national origin. Under *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973),

> . . . [t]he plaintiff [first] has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." [*McDonnell, supra*], at 802, 93 S.Ct. at 1824. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. *Id.*, at 804, 93 S.Ct. at 1825.

Burdine, supra at 252, 101 S.Ct. at 1093.

The overall burden, however, remains upon the Plaintiff. Price Waterhouse v. Hopkins, 109 S.Ct. 1775, 1788 (1989).

4) If Defendant offers evidence for the Plaintiff's rejection, the Court must then decide whether the rejection was discriminatory within the meaning of Title VII. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 714-15, 103 S.Ct. 1478, 1481, 75 L.Ed.2d 403 (1983). The McDonnell-Burdine presumption "drops from the case," Aikens, supra (citations omitted), and the Court must then determine "[whether] the defendant intentionally discriminated against the plaintiff." Aikens, supra at 715, 103 S.Ct. at 1482 (citations omitted).

> The plaintiff retains the burden of persuasion... [H]e may succeed in this either directly by persuading the court that a discriminatory reasons more likely motivated the

The overall burden, however, remains upon the plaintiff. Price Waterhouse v. Hopkins, 109 S.Ct. 1775, 1788 (1989).

4) If Defendant offers evidence for the plaintiff's rejection, the Court must then decide whether the rejection was discriminatory within the meaning of Title VII. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 714-15, 103 S.Ct. 1478, 1481, 75 L.Ed.2d 403 (1983). The McDonnell-Burdine presumption "drops from the case," Aikens, supra (citations omitted), and the Court must then determine "whether the defendant intentionally discriminated against the plaintiff." Aikens, supra at 715, 103 S.Ct. at 1482 (citations omitted).

> The plaintiff retains the
> burden of persuasion. [S]he
> may succeed in this either
> directly by persuading the
> court that a discriminatory
> reason more likely motivated
> the employer or indirectly by

> employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Burdine, 450 U.S. at 256, 101 S.Ct. at 1095. In essence, the Court must decide which party's explanation of the employer's motivation it believes. Aikens, 460 U.S. at 716, 103 S.Ct. at 1482. However, the Court may not impose its judgment on that of the employer's.

> [T]he employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria. The fact that court may think that an employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination.

Burdine, 450 U.S. at 259, 101 S.Ct. at 1097.

5) Other than Plaintiff's subjective opinion there is no evidence, direct or circumstantial, to substantiate discrimination based on either national origin or retaliation. This Court holds that an unlawful motive played neither "some part in the employment decision," nor was a significant factor" in this case. Walsdorf v. Board of Commissioners for East Jefferson levee District, 857 F.2d 1047, 1052 and n.1 (5th Cir. 1988).

6) Defendant has articulated legitimate non-discriminatory reasons for its actions and they were not a mere pretext to mask discrimination.

7) Plaintiff has failed to show by a preponderence of the evidence that he was discriminated against on the basis of his national origin or retaliation for protected activities., Cf., Loeb v.

5) Other than Plaintiff's subjective opinion there is no evidence, direct or circumstantial, to substantiate discrimination based on either national origin or retaliation. This Court holds that an unlawful motive played *neither* "some part in the employment decisions" *nor* was a "significant factor" in this case. *Reichert v. Board of Commissioners for East Jefferson Levee District*, 837 F.2d 1047, 1052 and n.1 (5th Cir. 1988).

6) Defendant has articulated legitimate non-discriminatory reasons for its actions and they were not a mere pretext to mask discrimination.

7) Plaintiff has failed to show by a preponderance of the evidence that he was discriminated against on the basis of his national origin or retaliation for protected activities. *Cf., Lamb v.*

Textron, Inc., 600 F2d 103 (1st Cir. 1979); Lindsey v. Southwestern Bell Telephone Co., 546 f.2d 1123 (5th Cir. 1977).

8) Since the Plaintiff is not the prevailing party, he is not entitled to a declatory judgment, injunctive relief, back wages, reasonable attorney's fees or costs of suit, or any other relief in this action. 42 U.S.C. § 2000e-6(k).

9) All costs are taxable against the Plaintiff.

10) Since Plaintiff has failed to show by a preponderence of the evidence that he was discriminated against on the basis of his national origin or retaliation the Defendant is entitled to a judgment.

11) Any conclusion of law which should more appropriately be a finding of fact is deemed so.

Textron, Inc., 600 F2d 143 (1st Cir. 1979); Lindsey v. Southwestern Bell Telephone Co., 546 F.2d 1123 (5th Cir. 1977).

8) Since the Plaintiff is not the prevailing-party, he is not entitled to a declaratory judgment, injunctive relief, back wages, reasonable attorney's fees or costs of suit, or any other relief in this action. 42 U.S.C. § 2000e-5(k).

9) All costs are taxable against the Plaintiff.

10) Since Plaintiff has failed to show by a preponderance of the evidence that he was discriminated against on the basis of his national origin, or retaliation the Defendant is entitled to a judgment.

11) Any conclusion of law which should more appropriately be a finding of fact is deemed so.

SIGNED this 31st day of August, 1989.

WALTER S. SMITH, JR.
UNITED STATES
DISTRICT JUDGE

②

No. 90-924

FILED

JAN 25 1991

JOSEPH F. SPANIOL, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1990

GUADALUPE RAMOS, PETITIONER

v.

JAMES A. BAKER, III, SECRETARY OF THE TREASURY

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

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(202) 514-2217*

QUESTION PRESENTED

Whether the courts below erred in concluding that respondent failed to show that his employer discriminated against him.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statute:

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-924

GUADALUPE RAMOS, PETITIONER

v.

JAMES A. BAKER, III, SECRETARY OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is unreported, but the judgment is noted at 915 F.2d 692 (Table). The decision of the district court (Pet. App. A13-A27) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1990. The petition for a writ of certiorari was filed on December 10, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, an Hispanic male employee of the Internal Revenue Service (IRS) at Austin, Texas, was twice

denied promotion from a position at a GS-12 salary level to one at a GS-13 level. Pet. App. A6-A7, A15-A16. On both occasions, the IRS ultimately selected a white male. On August 13, 1987, after exhausting his administrative remedies, petitioner filed suit in the United States District Court for the Western District of Texas alleging that the IRS discriminated against him on the basis of his race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a). Pet. App. A2, A16.[1]

After a bench trial, the district court rejected all of petitioner's claims and entered judgment in favor of the IRS. As to petitioner's first failure to obtain promotion, in October 1981, the court determined that petitioner "was not placed on the 'Best Qualified List' * * * because his numerical evaluation was too low," and concluded that petitioner's rating "accurately evaluated [his] performance" and that "[t]here is no evidence of any racial discrimination in this instance." Pet. App. A17. Although petitioner made the "Best Qualified List" on his second attempt at promotion in September 1982, the district court determined that "[t]he selected individual had a broader range of experience for the position than did [petitioner]. There is no evidence of racial discrimination in this instance." *Id.* at A18.[2] In general, the court rejected the argument that "the national origin of [petitioner] * * * [was a] factor[] in the actions or inactions regarding [him]," *id.* at A20-A21, concluding instead that "there is no evidence, direct or circumstantial, to substantiate discrimination," *id.* at A25, and that peti-

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[1] In addition to challenging the two promotion decisions, petitioner also alleged several instances of retaliatory conduct based on prior complaints of discrimination. Petitioner did not raise his retaliation claims in the court of appeals, Pet. App. A3, and they are not now in issue.

[2] The court also rejected petitioner's retaliation claims.

tioner "failed to show by a preponderance of the evidence that he was discriminated against." *Ibid.*

2. In the court of appeals petitioner argued that "an employer cannot articulate nondiscriminatory reasons for an employment decision when the employer considers subjective facts because an employee cannot effectively rebut subjective evaluations." Pet. App. A8. In an unpublished per curiam opinion, the court rejected this contention and affirmed the district court's findings of fact. The court "refuse[d] to hold that an employer may not offer subjective evaluations in order to rebut a plaintiff's prima facie case," *id.* at A9-A10, reasoning that "many jobs necessarily involve subjective qualities." *Id.* at A10. The court noted that a plaintiff could rebut subjective evaluations through "witness testimony and proof of job experience and other qualifications," *ibid.*, and concluded that petitioner "offered no evidence of intentional discrimination." *Id.* at A11.

ARGUMENT

The decisions of the district court and the court of appeals are correct and do not conflict with any decision of this Court or of any court of appeals. Accordingly, further review is not warranted.

1. Petitioner principally contends (Pet. 5-7) that the evidence showed the IRS's reasons for not promoting him to be pretextual. However, two courts have already soundly rejected this claim, both of them concluding that petitioner had presented no evidence at all of intentional discrimination. See Pet. App. A11, A25. This Court has declined "to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987) (quoting *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)). Petitioner comes

nowhere near this standard, offering instead simply bald assertions of factual error.[3]

2. Petitioner contends (Pet. 6) that subjective criteria may not be used to rebut a prima facie case of discrimination. The court of appeals correctly rejected this argument, noting that "many jobs necessarily involve subjective [evaluation]." Pet. App. A10. That petitioner established a prima facie case is immaterial, for once the trial is complete, as was the case here, "the *McDonnell-Burdine* presumption [of unlawful discrimination] 'drops from the case.'" *United States Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 715 (1983), quoting *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 255 n.10 (1981). This Court has often reviewed claims of discrimination against employers who distinguished between employees on the basis of subjective evaluation, and has consistently held that the basic inquiry remains whether a plaintiff has borne the burden of "persuading the trier of fact that the defendant intentionally discriminated against [him]." *Burdine*, 450 U.S. at 253. See *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567 (1978) (hiring decision based on personal knowledge of candidates and recommendations); *Burdine, supra* (discretionary decision to fire individual who was said not to get along with co-workers); *United States Postal Serv. Bd. of Governors* v. *Aikens, supra* (discretionary promotion decision). See also *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 988-989 (1988). Whatever the form of the IRS's rebuttal evidence, the ultimate burden of persuasion

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[3] As to the October 1981 promotion decision, petitioner asserts only that each of the three members of his evaluation panel gave him an identical numerical ranking and that this cannot be considered coincidental. Pet. 5. With respect to the September 1982 promotion decision, petitioner makes the conclusory assertion that the record contains "ample testimony" in support of his argument that the reasons offered by respondent were a pretext. *Id.* at 6.

fell on petitioner, a burden that – the district court and court of appeals firmly concluded – petitioner completely failed to meet.[4]

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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[4] Petitioner also argues (Pet. 7) that the courts below erred by failing to require the IRS to demonstrate a "business necessity" for its promotion decisions. This argument is incorrect, as it confuses the inquiry relevant to a "disparate treatment" case, where a plaintiff claims that he was discriminated against individually, with that relevant to a "disparate impact" case, where a plaintiff claims that a facially neutral employment practice has adverse effects on a protected group. In this case, one of disparate treatment only, see Pet. App. A3-A4, "business necessity" plays no part.

Finally, petitioner alludes (Pet. 5) to an alleged circuit conflict over the standard of causation to be employed in Title VII cases. See *Walsdorf* v. *Board of Comm'rs*, 857 F.2d 1047, 1052 n.1 (5th Cir. 1988). However, not only has this Court resolved that conflict, see *Price Waterhouse* v. *Hopkins*, 109 S. Ct. 1775 (1989), but it is irrelevant here, as petitioner presented no evidence at all of any kind of discrimination. There is therefore no need to address the standard of causation.

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